United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1982

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
- -x

In the Matter

-of-

MAY LEE INDUSTRIES, INC.,

Index No. 74-1982

Appellant.

(In Proceedings For An
Arrangement No. 74-B-166).

- -x

BRIEF OF APPELLEE, CHEMICAL BANK

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BRIEF OF APPELLEE, CHEMICAL BANK

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Appellant, MAY LEE INDUSTRIES, INC. (MAY LEE), primarily presents the following issues, all of which were raised before the Bankruptcy Court (Bankruptcy Judge John J. Galgay) and the United States District Court for the Southern District of New York (District Judge Robert J. Ward):

A. Whether Appellee, THE CHARTERED BANK (CHARTERED), perfected its security interest by properly filing a financing statement at the City Register's Office in New York County prior to the filing of the Petition for an Arrangement Under Chapter XI of the Bankruptcy Act by MAY LEE;

B. Whether the trust receipts which constitute the security agreements between CHARTERED and MAY LEE contained sufficiently detailed descriptions of the collateral;

C. Whether the security agreement with Appellee, CHEMICAL BANK (CHEMICAL) contained a sufficient description of the collateral;

D. Whether the security agreement between CHEMICAL and MAY LEE was valid and binding notwithstanding MAY LEE's contentions that:

i. there was no meeting of the minds with regard to the security agreement;

ii. CHEMICAL gave no consideration for the security agreement;

iii. the security agreement was obtained by economic duress;

iv. the security agreement was unconscionable;

E. Whether the financing statements (UCC-1s) filed by CHARTERED and CHEMICAL contain adequate descriptions of the collateral in

which CHARTERED and CHEMICAL claim perfected security interests.

F. Whether the procedure employed by CHARTERED and CHEMICAL to reclaim assets of MAY LEE in which the BANKS claim valid, perfected security interest was proper.

It is respectfully submitted that the answers to the statement of issues presented for review to this Court in the affirmative are contained in both Opinions of Bankruptcy Judge John J. Galgay, dated May 17 and June 10, 1974; the Order of the Bankruptcy Court, dated June 14, 1974 (Galgay, J.); and the Order of District Judge Robert J. Ward, dated July 19, 1974, wherein it was determined that both BANKS have valid, perfected security interests in the assets of MAY LEE and were entitled to take possession of those assets.

STATEMENT OF THE CASE

I. Nature of the Case

This is an expedited appeal by MAY LEE INDUSTRIES, INC. (MAY LEE), a debtor-in-possession, pursuant to a Proceeding for an Arrangement Under Chapter XI of the Bankruptcy Act, 11 U.S.C. §701 et seq. pending in the United States District Court for the Southern District of New York, from the Opinions and Orders of Bankruptcy Judge John J. Galgay and District Judge Robert J. Ward that THE CHARTERED BANK (CHARTERED) and the CHEMICAL BANK (CHEMICAL) (referred to, collectively, as "the BANKS") have valid perfected security interests in assets of MAY LEE.

II. The Course of the Proceedings

MAY LEE filed a Petition for an Arrangement Under Chapter XI of the Bankruptcy Act on February 11, 1974. Subsequently, by Orders to Show Cause dated March 14 and March 27, 1974, respectively, CHARTERED and CHEMICAL petitioned the Bankruptcy Court (Galgay, J.) for the reclamation of property in the possession of MAY LEE in which CHARTERED

and CHEMICAL claimed to have valid, perfected security interests. MAY LEE opposed the applications for reclamation by CHARTERED and CHEMICAL. Trials on the merits were held on April 9 and 19, 1974 before Bankruptcy Judge John J. Galgay.

III. Disposition of the Proceedings in the Courts Below

By Opinion dated May 17, 1974, Bankruptcy Judge Galgay determined that CHARTERED " . . . has a perfected valid security lien on all collateral which was the subject of series of trust receipts described in Exhibit "A" attached to its Order to Show Cause dated March 14, 1974 and is entitled to the return of such goods and other collateral which is the subject of the trust receipts." (Galgay Opinion, May 17, 1974, p. 7) (I. D. 25).*

Bankruptcy Judge Galgay also determined in his Opinion dated May 17, 1974, that CHEMICAL ". . . has a perfected valid security lien on all collateral which was the subject of its security agreement and is entitled to obtain the collateral." (Galgay Opinion, May 17, 1974, p. 12) (I. D. 25).

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*For the convenience of the Court "I. D. numbers" refer to the document numbers on the Index to the Record on Appeals in this matter.

On May 30, 1974, MAY LEE moved for a rehearing which was held on June 7, 1974. Following the rehearing, Bankruptcy Judge Galgay issued a Supplemental Opinion dated June 10, 1974 in which he again found in favor of the BANKS, stating, in relevant part, that: ". . . on the entire record before this Court including the rehearing, I am convinced that Chartered Bank and Chemical Bank are entitled to reclaim the collateral which was the subject of their Security Agreements." (Galgay Supplemental Opinion, June 10, 1974, p. 5) (I. D. 26).

On June 14, 1974, the Bankruptcy Court (Galgay, J.) entered an Order consistent with the Opinion dated May 17, 1974 and the Supplemental Opinion dated June 10, 1974.

On application of MAY LEE, Bankruptcy Judge Galgay signed an Order dated June 20, 1974 staying and enjoining the BANKS from enforcing the Order dated June 14, 1974. This stay, as modified by the District Court and Court of Appeals, Second Circuit, remain in effect.

By Notice of Appeal dated June 21, 1974, MAY LEE

appealed to the District Court from the Order of the Bankruptcy Court dated June 14, 1974. Thereafter, by Order dated July 19, 1974 (Ward, J.) the District Court affirmed the Order of the Bankruptcy Court dated June 14, 1974.

District Judge Ward, in concluding his decision, said, in relevant part: "The Court considers the debtor's (MAY LEE'S) remaining contentions to be without merit. Accordingly, the Order of the Bankruptcy Court that CHARTERED and CHEMICAL have valid perfected security interests in assets of the debtor is affirmed and the stay previously entered is vacated." (Ward Opinion, July 19, 1974, p. 7) (I. D. 11).

Subsequently, by Order to Show Cause dated July 21, 1974, MAY LEE made an application for an Order to this Court staying the enforcement of the Order dated June 14, 1974 pending the instant appeal. MAY LEE'S application for a stay of the June 14, 1974 Order was granted by Circuit Judge William Hughes Mulligan by Order dated July 23, 1974, on condition that MAY LEE make no disbursement of funds until the appeal was heard.

Thereafter, by Notice of Motion dated July 24, 1974, MAY LEE moved this Court for an Order modifying the Order dated July 23, 1974 to permit MAY LEE to make disbursements. By Order of this Court dated July 29, 1974 (Mulligan, J.) the Order of July 23, 1974 was modified to the extent that MAY LEE could make necessary expenditures on condition that it file a bond in the amount of $20,000.00 and no expenditures can be made in excess of the value of the bond.

As of the date of this brief, MAY LEE had not filed any bond, even a bond for security for costs.

STATEMENT OF FACTS

I. Introduction

Regrettably, CHEMICAL is required to set forth a separate statement of the facts of this matter, because the MAY LEE "statement of facts" is full of misstatements, errors and "facts" which cannot be found anywhere in the record below. Unfortunately, MAY LEE has a habit of introducing "facts" in memoranda and briefs, but not during hearings or by documentary evidence.

For example, after the Order dated May 17, 1974, at an Adjourned First Meeting of Creditors of MAY LEE on May 28, 1974, MAY LEE'S president, DAVID C. BUXBAUM (BUXBAUM), a lawyer, referred to the security agreement between CHEMICAL and MAY LEE and the following exchange took place:

* * * *

BUXBAUM: "We objected to the security agreement -- there was no meeting of the mind on the security agreement.

THE JUDGE: "There was no evidence of that offered at the trial. This all appeared in a reply brief that wasn't authorized by the court and it seemed to be an after thought on the part of your counsel. . . .

BUXBAUM: First of all, I think my counsel was under the impression that if you decided definitely to go ahead with a decision on this matter that you would give him some opportunity to press his arguments. He attempted to --

THE JUDGE: He did go ahead with the hearing. CHEMICAL introduced the documents and you were in a position to cross examine or do anything you wanted at that time.

BUXBAUM: Yes, but at that time it was my counsel's decision that it was premature to raise this issue. . . ." (Emphasis added) (Transcript of Hearing on May 28, 1974, before Galgay, J., pp. 7-8).

* * * *

Interestingly, Bankruptcy Judge Galgay commented on the bizarre procedures employed in this matter by MAY LEE in the Opinion dated May 17, 1974:

"Finally, there was an unusual procedural matter which occurred after the trial concluded and the Court had taken the

> matter under advisement. The Court received a reply brief in opposition to Chemical Bank's application for reclamation by counsel for the debtor-in-possession, Arutt, Nachamie and Benjamin. No request was made or authority granted to file such a brief. However, the Court has examined it and finds that under the heading of argument, counsel attempts to put into evidence matters which should have been raised at trial. For example, the debtor-in-possession's counsel now attacks the security agreement claiming there was no meeting of the minds of the respective parties; that there was no consideration given for the security agreement; that the contract involving subordination agreements were unconscionable and ought to be stricken and that the agreements with Chemical Bank were obtained by threats of economic duress against the debtors, etc. To cap it all the Reply Brief carries no signature of counsel who prepared it. I place no weight on the matters contained in the Reply Brief. (Galgay Opinion, May 17, 1974, pp. 12-13) (I. D. 25).

Sadly, MAY LEE continues to introduce "facts" in the briefs which appear nowhere in the record below. In its Statement of Facts submitted to this Court, MAY LEE refers to financing negotiations with "a major American corporation", (MAY LEE Circuit Court Brief, pp. 4-5), conducted

with the knowledge of CHARTERED or, MAY LEE refers to an "error" by CHEMICAL ". . . in depositing certain monies . . ." which resulted in a decision " . . . to convert its unsecured loans into what it hoped would be secured loans." (MAY LEE Circuit Court Brief, pp. 12-13). None of these "facts" can be found in the record and MAY LEE does not refer this Court to any portion of the record.

II. The Facts*

The facts of this matter involve simple banking transactions.

MAY LEE, a company primarily engaged in the business of importing and wholesaling of rugs, gift items and related goods principally obtained from the Peoples Republic of China, approached CHEMICAL in the latter part of 1971, seeking to borrow money and obtain a line of credit. Begin-

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*Those facts relating to the perfected security interest of CHARTERED are set forth at length in the brief of CHARTERED; they are incorporated herein by reference and will not be repeated. However, reference to the facts regarding CHARTERED'S security interest shall be made in the course of this brief.

ning at that time and continuing through the early months of 1973, CHEMICAL advanced various sums to MAY LEE.

On April 23, 1973, MAY LEE acknowledged that the total amount due and owing to CHEMICAL from the Debtor was $182,090.71 plus interest, costs of collection and attorneys' fees (the indebtedness). To induce CHEMICAL to forebear collection of the indebtedness at that time, on April 23, 1974 MAY LEE and its principals executed, among others, the following documents:

A. Security Agreement and Rider (CHEMICAL'S Exhibit "A" marked in evidence, April 19, 1974 Hearing Transcript, pp. 72-75) (I.D. 24).

B. Agreement of Subordination and Assignment and Rider (CHEMICAL'S Exhibit "B" marked in evidence, April 19, 1974, Hearing Transcript, pp. 72-75) (I. D. 24).

C. Agreement and Addendum (CHEMICAL'S Exhibit "C" marked in evidence April 19, 1974, Hearing Transcript, pp. 72-75) (I. D. 24)

D. UCC-1 Forms (CHEMICAL'S Exhibit "D" marked in evidence April 19, 1974 Hearing Transcript, pp. 72-75) (I. D. 24).

(These documents are collectively referred to as the April 23 Documents).

All of the April 23 Documents were annexed as exhibits to CHEMICAL'S Petition dated March 26, 1974 in support of its Order to Show Cause dated March 27, 1974 for an Order of Reclamation. Significantly, all of the April 23 Documents which form the basis of CHEMICAL'S claims against MAY LEE were marked in evidence at the hearing before Bankruptcy Judge Galgay on April 19, 1974 without objection by counsel for MAY LEE. (April 19, 1974 Hearing Transcript, p. 74) (I. D. 24).

The April 23 Documents establish the valid perfected security interest of CHEMICAL in the assets of MAY LEE.

The Agreement and Addendum acknowledges MAY LEE'S Indebtedness to CHEMICAL in the total amount of $182,090.71, exclusive of interest, costs of collection and attorneys' fees as follows:

1. Promissory Note of Debtor dated October 5, 1972 in the amount of $25,000;

2. Promissory Note of Debtor dated September 11, 1972 due December 15, 1972 in the amount of $75,000;

3. Contingent letter of credit liability $1,700;

4. Loans and Advances under letters of credit $10,000;

5. Acceptances of $30,000; and

6. An overdraft of $40,390.71.

The Agreement and Addendum also provide that MAY LEE grants to CHEMICAL a security interest for the Indebtedness in all its inventory, contract rights, accounts receivable and all other property and assets it owns, except that in which it has granted a security interest to CHARTERED.

The Security Agreement and Rider provides, in relevant part, that as security for the payment of the Indebtedness and other liabilities of MAY LEE to CHEMICAL, the Bank has a security interest in the following collateral and all and any proceeds arising therefrom and all and any products of the collateral:

1. All inventory and goods of MAY LEE then owned or thereafter acquired, including inventory or goods in transit, and wherever located which are held for sale or lease or are to be furnished under contracts of service, or which are raw materials, work in process, or materials used or consumed in MAY LEE'S business, or furnished goods and supplied customarily classified as inventory;

2. All rights of MAY LEE to payments which are to be earned by performance under contracts, then existing or thereafter arising;

3. All accounts, notes, drafts, acceptances and other forms of obligations and receivables for goods sold or leased or services performed by MAY LEE, then or thereafter arising, together with all guaranties and securities therefor and all right, title and interest of MAY LEE in the merchandise which gave or shall give rise thereto, including the right of stoppage in transit; and

4. Any other tangible or intangible property then owned or thereafter acquired, including without limitation fixed assets, fixtures and equipment.

The Security Agreement and Rider also provides, among other things, that anything contained therein to the contrary notwithstanding:

> "..."Collateral" shall not include any of the above described property in which the Borrower has granted a "Security Interest" to The Chartered Bank under a financing statement filed with the Secretary of State on December 4, 1972 under Filing No. 1311Z8, nor any property of the type described above in which the Borrower may, after the date hereof, give a "Security Interest" to others for inventory, letter of credit, and resulting acceptance financing."

Thus, CHEMICAL has a valid security interest in all assets of MAY LEE. CHEMICAL perfected its security interest in assets of MAY LEE by appropriate filing of UCC-1 Forms with the Secretary of State of the State of New York and the New York County Register's Office (April 9, 1974 Hearing Transcript, p. 70) (I. D. 23).

On February 11, 1974, MAY LEE filed a Petition for an Arrangement Under Chapter XI of the Bankruptcy Act which listed CHEMICAL as a secured creditor in the amount of $209,090.64 in Schedule "A-2". (April 19, 1974 Hearing Transcript, p. 88 and MAY LEE'S Petition for an Arrangement Under Chapter XI of the Bankruptcy Act) (I. D. 24). Significantly, the only other secured creditor listed in Schedule "A-2" to MAY LEE'S Petition for an Arrangement Under Chapter XI of the Bankruptcy Act is CHARTERED. Schedule "A-2" to MAY LEE'S Petition for an Arrangement Under Chapter XI of the Bankruptcy Act listing CHEMICAL as a secured creditor was verified by BUXBAUM.

MAY LEE lists CHEMICAL as a secured creditor in schedules filed with the Bankruptcy Court, because that is what is clearly established in all the documentary evidence

including a ratification of the Agreement and Addendum (CHEMICAL'S Exhibit "C" marked in evidence April 19, 1974, Hearing Transcript, pp. 72-75) (I. D. 24), supra, by letter agreement dated December 13, 1973, which states:

> "The undersigned requests that Chemical Bank waive any defaults by the undersigned which have occurred up to and including October 31, 1973 in the Agreement dated April 23, 1973 between Chemical Bank, May Lee Industries, Inc., David C. Buxbaum, and Lawrence M. Greenberg.
>
> The undersigned further requests that Chemical Bank waive any violations by the undersigned, which occurs between July 1, 1973 and July 1, 1974 with regard to Paragraph "7" of the aforementioned Agreement.
>
> All the terms and provisions of the aforementioned Agreement shall remain in full force and effect and the waivers requested herein shall be strictly limited to the extent requested above." (CHEMICAL'S Exhibit "Z" marked in evidence June 7, 1974 Hearing Transcript, pp. 49-56) (I. D. 28).

The letter agreement dated December 13, 1973 was signed by BUXBAUM as President of MAY LEE, BUXBAUM individually, BUXBAUM as attorney for LAWRENCE M. GREENBERG and by a Vice President of CHEMICAL.

MAY LEE has never introduced a single shred of documentary evidence to challenge the valid perfected security interest of CHEMICAL in MAY LEE'S assets. MAY LEE'S uncorroborated claims with regard to the CHEMICAL security interest in MAY LEE'S assets that there was no meeting of the minds, no consideration, economic duress and unconscionability are supported only by BUXBAUM'S statements and were totally rejected by the Courts below.

The documentary evidence introduced by CHEMICAL shows there is no factual basis for MAY LEE'S claims. In his Supplemental Opinion dated June 10, 1974 (I.D.26), Bankruptcy Judge Galgay, addressed himself to the belated claims raised by MAY LEE, and, in relevant part, ruled:

> ". . . the debtor (MAY LEE) claimed the agreement dated April 23, 1973 (. . . CHEMICAL'S Exhibit "C") between Chemical and the Debtor (MAY LEE) and two of its officers is invalid because there was no meeting of the minds and lack of consideration.
>
> After hearing testimony from Dr. Buxbaum, principal officer of the debtor in possession (MAY LEE), and examining the document, the Court finds this was a valid binding agreement entered into by the parties, there was a meeting of the minds and was for valuable consideration. The Chemical officer signed it after the Debtor (MAY LEE) made changes and initialed them. The fact that Chemical did not initial the changes is of no consequence.

PETITION

Pursuant to Rule 40 of the Rules of Appellate Procedure, Appellant-Trustee, May Lee Industries, Inc. petitions this Court for a rehearing on the grounds that in the opinion of petitioner points of fact and law have been overlooked by this Court as more fully set forth in the attached petition. The Petitioner requests that this Court make its determination on this petition known to the parties to this action.

REQUEST FOR REHEARING EN BANC

The Petitioner-Appellant requests that this rehearing be heard en banc because of the following enumerated reasons.

1. Facts of the Case Have Not Been Clearly Examined by the Court

The Petitioner-Appellant has been deprived of a fair hearing on the facts by the expeditious treatment of this matter before the courts below. The decision below, upholding the decision and order of the Bankruptcy Court, with regard to the Security Agreements (trust receipts) of Appellee Chartered Bank is so clearly in error that even Appellees have not disputed this error. Nevertheless no court has in its opinion or order examined these trust receipts or ruled on the decision of the Bankruptcy Judge. Where the Judge says these documents refer to attached invoices, the facts are that some do and some do not. Where the Judge says these trust receipts contain a general description of collateral, some do and some do not. The discrepancy between the decision and order and the actual documents must be examined if justice is to be done. This task is an onerous one but one that is required for justice to be done. The details are more fully spelled out in the argument below.

2. Decision Upholding the Adequacy of Description of Collateral in the Trust Receipts of Chartered Bank is a Unique Holding in the United States.

The Court of Appeals, by its per curiam affirmation of the District Court decision upholding the adequacy of the description of the collateral in the security agreements (trust receipts) of Chartered Bank is deviating from the entire weight of authority in the United States of America.

While the Uniform Commercial Code (UCC) and the cases interpreting the UCC have held that a description of collateral in a financing statement can be simple and is designed to put the parties on notice that a security agreement is on file, the security agreement must adequately describe the collateral so that it is easily subject to identification. No case has deviated from this line of authority. The traditional law required a full and complete description of the collateral and a full and accurate serial number. This so called "serial number test" no longer exists. The state law, however, and the Bankruptcy Law both require that identification of collateral be so full and complete as to adequately and easily determine which collateral belongs to a secured party. The fact that the collateral is recognized but not segregated, has been held in a leading case, to require that it not be deemed part of a security interest. The fact that the banks may not be secured does not mean that they are not creditors of the Petitioner-Appellant. It merely means that the banks are not preferred over other creditors.

3. No Case in the United States Has Ever Held that a Secured Party Does Not Have to Prove Which Specific Collateral Attaches to His Lien

The premise of the case of the Appellees is that they do not have to prove which collateral belongs to them. Never has a court in the United States so held. The overwhelming and exclusive holdings are to the contrary. The Court would establish a dangerous precedent by upholding such a ruling and dismantle the very nature of the UCC and related aspects of Bankruptcy Law.

During oral argument the Attorney for Chartered Bank admitted he could not

identify the collateral to which his lien attaches. The case should have been determined against him at that instant. This collateral, which consists in no small part of unique Chinese rugs retailing at $4000 per rug, if not identifiable is not subject to any lien.

4. The Sustaining of the Chemical Bank Lien Destroys the Bankruptcy Law

The Chemical Bank lien as determined by the Order of June 14, 1974 of the Bankruptcy Court, is all embracing and includes everything past, present and future, to which a lien could apply. Thus the Chemical Bank has asserted and such an interpretation is possible under the June 14, 1974 order, that its lien would apply to the current services rendered by the Debtor-in-Possession. Sustaining such a lien would be unique in the Court system of the United States. A Debtor-in-Possession is, as has been unanimously held, a trustee, a new and unique legal entity. If liens are permitted to pierce this legal veil, then there is no reason for a Bankruptcy Law, because no debtor could rehabilitate himself. In fact, it has never been held that a lien could pursue the debtor-in-possession except to the extent of covering specific property in his hands from the debtor (the prior legal entity) to which a specific lien applies.

5. The Allegation that May Lee is a Worthless Entity With No Assets and a Court Should Not Waste its Time on This Case is False

May Lee has inventory worth only approximately $120,000 at cost or perhaps $200,000 at wholesale value. The inventory cannot possibly cover its indebtedness. This is not the total value of the corporation. The corporation was the first to be invited to do business with the People's Republic of China and has through its subsidiaries, represented numerous major American clients in China. May Lee, the Appellant, can rehabilitate itself.

There are, in addition, people in the Department of State, the Commerce Department and the National Council of United States-China Trade who are willing

to assert that May Lee's preservation is important for Chinese-American relations. The names of said officials can be supplied.

It would be a travesty of justice if this unique corporation with important know-how and expertise were dismantled because the Courts did not feel it was worth the bother to examine this case.

6. Conclusion

A hearing en banc is called for by the facts and assertions above and the Appellant-Petitioner respectfully prays for such a hearing.

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I. FACTS OVERLOOKED BY THE COURT

On August 21, 1974 the Honorable Judges Oakes, Frankel and Kelleher issued a per curiam judgment affirming the order of the District Court of the Southern District of New York. Said District Court Decision of July 19, 1974 affirmed the opinions of May 17 and June 10, 1974 of the Bankruptcy Judge and the order of June 14, 1974 of said Bankruptcy Court.

A. The Adequacy of Description of Collateral in the Trust Receipts of Chartered Bank

The Chartered Bank Security Agreements are trust receipts. The evidence of these trust receipts is to be found in the Petition of Chartered Bank for Reclamation, dated March 14, 1974 and in the exhibits introduced into evidence which are at present in a manilla envelope with all other exhibits as part of the file before the Court of Appeals.

1. Decision of Bankruptcy Court

The Supplemental Opinion of the Bankruptcy Court of June 10, 1974 p. 3 deals with these documents stating the following:

> The security agreements each give a general description of the goods representing the collateral and refer to an attached invoice. These invoices are quite specific in describing the Collateral. The security agreements satisfy the Statutory requirement and are valid.

The District Court Opinion of July 19, 1974 sustains this decision of the Bankruptcy Court on page 6 of said opinion. The Court of Appeals decision of August 21, 1974 sustains the District Court opinion.

2. Analysis of the Supporting Facts

In order to determine whether or not this opinion of the Bankruptcy Court, quoted above, is a correct one it is imperative that the attached documents be examined. These documents are attached to the Chartered Bank petition for reclamation and are exhibits entered into evidence at the trial and are before the Court of Appeals. It is also important to compare these two submissions of documents because they are not identical. Each document has a number on it. In addition in that the petition for reclamation only contains photocopies of the documents one must understand how to read them. Thus the first document in the petition for reclamation of Chartered Bank, there is a number eight (8) in a circle in the lower left corner of the page. The next page behind it is really a photocopy of the rear of the first page and was never a separate page. The third page is a photocopy of a document that the Chartered Bank alleges was stapled onto the first document. The first document is a trust receipt. The second document is supposed to be an invoice. In order for the Court to determine whether or not the decision below was correct it is necessary to examine the documents in the petition and the documents submitted into evidence, both of which would have on the first page a small eight in a circle in the lower left hand corner. Only by comparing these two documents can one determine correctness of the Bankruptcy Court decision.

a. Testimony Before Bankruptcy Court

There was uncontradicted testimony at the trial regarding these matters that at the time of the signing of the trust receipts there were never any documents attached to them.

(Testimony of David C. Buxbaum, hearing of April 19, 1974, pages 62-63, lines 24-25, 3-8):

> Q I am not asking you to testify as to which specific trust receipts had any invoices. The question is, were any invoices attached to any trust receipts?
> A Was there ever an invoice attached to a trust receipt at the time it was presented to me?
> Q Yes
> A Not to my recollection.

Although not entirely clear, the testimony of the Chartered Bank's own employe seems to support that of the Appellant in the hearing of April 9, 1974, on pages 55-56, lines 22-25, 3-11 of the transcript:

> Q I note that among the papers that you hold in your hand there are a number of attached pieces of paper such as in the case of the one that is on top, a piece of paper bearing some handwritten notations.
> A Right
> Q Was that document submitted as part of the document signed by May Le that piece of paper there or is that part of the bank's internal records?
> A Internal, when an item is due and it is not paid, we usually extend it, you know, put it down for a new due date.

The Appellant asserts that the Court hereinbelow wrongfully did permit the documents to be entered into evidence. Said objections were made, for example, at the hearing of April 19, 1974, on pages 20, 25 and 26 where counse for the Appellant stated:

> I would object to the introduction in evidence of any of these trust receipts and customs forms as in no way being connected with the case. They were not referred to in the security interests at any time, which simply refers to documents of title. It certainly does not refer to customs forms which identify the items.

As noted above the Bankruptcy Court claimed that the Security Agreements (trust receipts) refer to an attached invoice.

The District Court held that the Bankruptcy Court's

> ...finding that the invoices were part of the security agreement is supported by the record and cannot be said to be clearly erroneous despite conflicting testimony on that issue. (p. 6)

The only testimony on that issue has been quoted hereinabove. There is no conflict with that testimony - only supporting testimony. The District Cour is clearly in error when it refers to conflicting testimony on this matter -

there is none. The only testimony shows that when these documents were presented to the Debtor they had no invoices attached.

b. Examination of Document Numbered Eight but Put First in Petition

An examination of the document number 8 which is the first one in the petition is important. The document in the petition must be compared with the document in the Exhibits introduced into evidence. The reason is that the attachments to the same documents differ. The document attached to the petition which is the third page of the photocopy is a customs form. The document attached to the document eight introduced into evidence is a different document. Therefore the following errors are clear from merely an examination of the first document in the petition. Where the Bankruptcy Court has said that invoices are attached to the trust receipts it is wrong. The attachments to this document are not invoices, but customs documents. Secondly the District Court opinion stating that the invoices were part of the trust receipts is clearly wrong. Note that the amounts on document 8 attached to trust receipt 8 in the Petition total $4812.00 while the amount on the document attached to trust receipt 8 in evidence amounts to $49.10. What could be a clearer indication of the dismal nature of Appellee Chartered Bank's case than the fact that the attachments to the same trust receipt differs in the Petition and the trust receipt introduced into evidence. What could be clearer proof of the fact that these documents were never attached to these trust receipts.

c. The Security Agreements give a General Description of Collateral

The opinion of the Bankruptcy Judge sustained by the District Court and this Court and quoted on page 5 of this petition states: "The Security agreements give a genreal description of the goods representing the collateral..." Please review the following documents as examples: Trust receipt 5 in the Petition and numbered 5 in evidence, trust receipt 37 in the Petition and numbered 38 in

evidence. Note that these ir no description at all of the collateral and thu not even a general description. Therefore this part of the decision affirmed this Court is clearly in error.

d. Reference to Attached Invoices

The Bankruptcy Court decision which has been sustained and quoted on page 5 above states that the trust receipts "...refer to an attached invoice.

Please examine the following Trust Receipts: 5 in the petition and 5 marked in evidence; 7 in the petition and marked 10 in evidence; 27 in the petition and marked 26 in evidence; 28 in the petition and marked 25 in evide 30 in the petition and marked 31 in evidence, 32 in the petition and marked 33 in evidence; 34 in the petition and marked 35 in evidence. None of these documents refer to an attached invoice. The opinion sustained by this Court therefore is clearly in error.

e. The Invoices are Specific

"These invoices are quite specific in describing the collateral", stat the sustained opinion of the Bankruptcy Judge quoted on page 5 above.

These so called invoices read in part as follows: Number one in petiti and marked 8 in evidence: "one (1) pck containing silver plated costume jewel Number 3 in petition and number 7 in evidence: "General Merchandise Samples as pet contract No. 3AAPU026". These are obviously not specific and therefor the decision of the Court is clearly in error. In addition, however, even th documents which were never attached and are not really invoices, but which ar more specific, fail to satisfy the UCC statutory requirement and the requirem of the Bankruptcy Law. For example examine the invoice attached to trust rec 4 in the petition and number 9 as submitted into evidence. It states:

> 85 bales of Carpets as per Contract No. CA72ABS/7033 Labels shown "Made in China" 100% Wool Pile size; type; and pattern number fastened on carpets.

It then lists the design type but not the particular design number, th number of pieces but not the size of the pieces, and the cost per square foot

To identify said carpets, the burden of which is clearly upon the Appellees, one must know the exact size, border color, ground color, pattern number, shipment identification, and other information such as whether it is closed or open backed whether it is chemically washed or unwashed, etc. Only then could anyone select those carpets that attach to their lien. These carpets are each unique and valuable. The better ones in 9x12 size retail for over $4000 in the department stores. They are not little slips of bamboo. Nor can any of the goftware be identified by the so called invoices.

Therefore the Chartered Bank has failed to sustain its burden and is an unsecured creditor.

The Bankruptcy Law regarding liens is clearly stated in 4A Collier on Bankruptcy, 14 Ed, p. 354-356:

> In other words, to sustain a claim to trust property or to an equitable lien thereon, the claimant must depend upon his ability to identify the property in its original or substituted form in the hands of the bankruptcy trustee. The basic idea of the trust doctrine as applied in bankruptcy is a fair and reasonable identification of the property or fund so as not to harm other creditors. It is not enough, therefore, to show merely that the funds or property came into the bankrupt's hands or went into the bankrupt's business or, by the better view, even that the funds or property are contained somewhere within the bankrupt's estate. If the trust fund or property cannot be identified in its original or substituted form, the cestui becomes merely a general creditor of the estate, for the prevailing rule in trusts is that "a beneficiary who cannot find the trust property has not lien or charge spread over the entire estate of the faithless trustee."

II. LEGAL PROBLEMS IN SUSTAINING FILING OF CHARTERED BANK

The unique results of sustaining the Bankruptcy Court decision and District Court decision has been noted in the summary above petition for a rehearing en banc. In addition there is another serious legal problem in sustaining the decisions below.

a. No Court in New York has Held that The Burden of A Filing Officer's Error Falls Upon a Trustee in Bankruptcy

The evidence hereinbelow has shown thatthe filing of the Chartered Bank

financing statement could not be found in the New York County Registers O as required by the UCC. The evidence also showed that Chartered Bank had an attempt to file its financing statement. No New York court has sustai the position of Chartered Bank that a mistake by a clerk in filing the fi statement was to be borne by an ideal hypothetical lien creditor - a trus bankruptcy. Such a position has, however, been sustained by the 3rd Circu In Re Royal Electrotype Corp. 485 F. 2d 394 (1973). That decision did not New York law and seems contrary to the decisions in New York heretofore. Affirmation of such a decision by this circuit should not be made on a per curiam opinion without legal analysis.

b. No Court in the Nation Has Sustained a Holding that Wher There was No Evidence of Error by a Clerk the Allegedly Secured Party Prevails

In this case at bar Chartered Bank offered no evidence that there w error by the clerk in the New York County Registers Office that prevented filing from appearing. The UCC is a notice statute. One must be able to upon the filings in the file. Where the file is not reliable because of a error of the clerk it has been held by the 3rd Circuit, that an exception made on behalf of the alleged secured party. Such an exception may not be desireable and is contrary to the basic intent of the UCC as a notice statu However, no court in the nation has sustained the validity of a filing whe the filing is not in the appropriate files and in addition there is no evi of mistake by a clerk. In this case the Chartered Bank never offered evid that any clerk has made an error. Therefore the decision of this Court in taining the District Court is, to say the least, startling, in view of the uniqueness of the holding and the fact that there was no actual opinion dea with this matter.

III. THE SUSTAINING OF THE CHEMICAL BANK LIEN IS AN ACT UNIQUE TO LEGAL HISTORY

The alleged lien of Chemical Bank is described in the Order of the Bankruptcy Judge of June 14, 1974. Aside from its lack of consideration and unconscionability which no court, including this Court, has dealt with substantively, the lien sustained is so broad as to violate the fundamental principles of the Bankruptcy Act and its express intent. The lien granted by the Court includes the following as quoted from the Order of June 14, 1974, p. 3 &

(A) All inventory and goods of the Debtors, then owned or thereafter acquired, including inventory or goods in transit, and wherever located which are held for sale or lease or are to be furnished under contracts of service, or which are raw materials, work in process, or materials used or consumed in Debtor's business, or finished goods and supplies customarily classified as inventory;

(B) All rights of the Debtor to payments which are to be earned by performance uncer contracts, then existing or thereafter arising;

(C) All accounts, notes, drafts, acceptances and other forms of obligations and receivables for goods sold or leased or services performed by the Debtor, then or thereafter arising, together with all guarantees and securities therefor and all right, title and interest of the Debtor in the merchandise which gave or shall give rise thereto, including the right of stoppage in transit;

(D) Any other tangible or intangible property then owned or thereafter acquired, including without limitation fixed assets, fixtures and equipment;...

While the lien of Chemical Bank in its document actually delimits its interest to goods not financed by Chartered or other Banks its lien as granted below is so broad as to be in violation of law.

A. The Appellant Petitioner is a Trustee in the Position of a Hypothetical Lien Creditor

As stated in 8 Collier on Bankruptcy, 14 Ed p. 957:

A debtor who continues in possession is vested by sec 342 with all the titles of a trustee appointed under the Act. That means the title possessed by a trustee appointed under sec 44 in an ordinary bankruptcy proceedings under Chapter I-VII.

The powers of said trustee are enumerated in part by 4A Collier on Bankruptcy 14 Ed p. 595, 596:

> It was said of the precursor of this provision that it conferred
> the trustee 'by force of law' the status of the ideal creditor, i
> proachable and without notice, armed cap-a-pic with every right a
> power which is conferred by the law of the state upon its most fa
> creditor who has acquired a lien by legal or equitable proceeding
> the description of the trustee's position under formed law Sec. 7
> was apt, it is more so under the broader language of the amended

A debtor-in-possession is a new legal entity as all cases and learned wr relevant to this mater hold. The debtor-in-possession is not the equiva of the debtor, the prior legal entity.

A lien cannot be granted to pierce this legal entity, which is pr what the Bankruptcy Court lien purports to do. For example it states tha covers "...all rights...under contracts, then existing or thereafter aris This could be construed to mean that new contracts established by the deb in-possession are subject to the lien of the Chemical Bank. If this is t intent of this Court's decision it has annulled the Bankruptcy Act which lated a debtor-in-possession, trustee from such liens. Similarly other g of said lien such as ...tangible or intangible property then owned or the acquired...." could be construed to follow the debtor-in-possession. No lien has even been granted. Liens are granted only upon the property in hands of the debtor, a prior legal entity, now held by the debtor-in-poss As stated by Collier there are no liens over the entire estate of a trust let alone liens that purport to be a charge upon an estate. A lien can o and does only apply toproperty in the hands of the debtor, specifically i tified by the alleged lienholder. Chemical Bank has not met this test. lien as granted violates the law. Where there is one and only one allege holder a lien could be sustained on all assets of the debtor (and only th debtor), that came into the hands of the debtor-in-possession, it cannot sustained where there are multiple lienholders who must identify the spec property to which their lien attaches or failing to do this become unsecu creditors.

In this case there are multiple lienholders and the grant seems to exceed that permitted by Bankruptcy Law. Surely it is respectfully submitted, this Court was in error when it sustained such a lien.

IV. CONCLUSION

On the basis of the above the Petitioner, Appellant prays for a rehearing en banc and reconsideration of this matter and requests that the determination of this Court be made known to the parties.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

In the Matter -of- MAY LEE INDUSTRIES, INC., Debtor-in-Possession.	Index No. 74-1982 AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LAURA SANTANGELO, being first duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 415 Stratford Road, Brooklyn, New York.

That on the 3rd day of September 1974 at No. 230 Park Avenue, New York, New York, 200 Park Avenue, New York, New York and 67 Wall Street, New York, New York deponent served the within Petition for Rehearing and Request for Rehearing En Banc and Motion to Recall Mandate on appellee's therein named, by delivering a true copy of each to said appellee's via their attorneys OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C., attorneys for Chemical Bank, HEIKO & BUSH, attorneys for Unsecured Creditors and HAWKINS, DELAFIELD & WOOD, attorneys for Chartered Bank personally; deponent knew the persons so served to be the attorneys for the appellees described therein.

Sworn to before me this
3rd day of September 1974
John F. V. Silk

Laura Santangelo
LAURA SANTANGELO

JOHN F. V. SILK
Notary Public, State of New York
No. 41-3665750
Qualified in Queens County
Cert. filed in New York County
Commission Expires March 30, 1975